MANILAL & SONS (M) SDN. BHD.

v.

MAHADEVAN MAHALINGAM & ANOR.

PRIVY COUNCIL
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD MACKAY OF CLASHFERN
SIR DENYS BUCKLEY
[PRIVY COUNCIL APPEAL NO. 10 OF 1985]
10 FEBRUARY 1986

CIVIL PROCEDURE: *Claim for payment of difference between sums paid and amount repaid - Plea of limitation - Compound interest - Whether it could be allowed.*

This was an appeal from a judgment of the Federal Court of Malaysia allowing in part, an appeal from an order of the Judicial Commissioner, High Court, Ipoh. The respondents are the executors and trustees of the estate of Mahalingam Ratnavale deceased ("Mr. Ratnavale"). The appellants ("Manilal") paid the sums of RM29,500 and RM250,000 to Mr. Ratnavale in 1966 and 1967 respectively. In 1968 Mr. Ratnavale repaid a sum of RM50,000 to Manilal. The claim pursued by Manilal was for payment of the difference between the total of the sums paid by Manilal to Mr. Ratnavale and the amount repaid by him.

The learned Judicial Commissioner held that Manilal had established that the difference between the sums they paid and the amount repaid by Mr. Ratnavale of RM229,500 was paid to Mr. Ratnavale on the security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah. The learned Judicial Commissioner further held Manilal entitled to repayment of the balance of RM229,500 with interest thereon at 10 per cent per annum compound with yearly rests from 21 June 1968 to the date of judgment and thereafter at 8 per cent per annum to the date of satisfaction.

Mr. Ratnavale's executors appealed to the Federal Court. The Federal Court allowed the appeal except in so far as it related to the sum of RM29,500, holding that the sum of RM250,000 which at the time the action was instituted had become statute barred. Manilal appealed to the Privy Council.

Held:

[1] Their Lordships were of opinion that neither the reasons expressed in the judgment of the Federal Court, nor the additional matters raised in argument by learned Counsel for the respondents at the hearing of this appeal, were sufficient to displace the findings of fact on this matter by the learned Judicial Commissioner. Proceeding on this basis, the plea of limitation fails since the action was raised within six years from the date on which the cause of action in respect of the RM229,500 balance arose.

[2] On the question of interest there was no evidence before their Lordships to indicate that the learned Judicial Commissioner's assessment of 10 per cent as a reasonable rate of interest was wrong and no basis upon which they could fix any other figure. The rate of interest awarded by the learned Judicial Commissioner should be restored, but only as simple interest since the appellants accept that it was wrong for him to have awarded compound interest.

[3] The appeal was allowed with costs before the Federal Court and the Board and the judgment of the learned Judicial Commissioner restored with the deletion therefrom of the words "on the security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah" and the words "compound interest with yearly rests".

[Appeal allowed with costs.]

Cases referred to:
Chow Yee Wah & Anor. v. Choo Ah Pat [1978] 2 MLJ 41
Overseas-Chinese Banking Corporation Limited v. Philip Wee Kee Puan [1984] 1 CLJ (Rep) 25
K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10

Legislation referred to:
Limitation Act 1953, ss. 6(1), 26(2)

JUDGMENT

Lord Mackay:

This is an appeal from a judgment of the Federal Court of Malaysia (Salleh Abas CJ Malaya, Abdul Hamid FJ and Syed Agil Barakbah FJ) dated 20 January 1984 allowing in part, an appeal from an order of the High Court of Malaya at Ipoh (E.E. Sim JC) dated 22 March 1983 which is brought pursuant to special leave recommended by the Judicial Committee on 24 May 1984 and granted by His Majesty the Yang di-Pertuan Agong on 4 December 1984.

The respondents are the executors and trustees of the estate of Mahalingam Ratnavale deceased ("Mr. Ratnavale").

There are concurrent findings by the Judicial Commissioner and the Federal Court that on 20 December 1966, the plaintiff company ("Manilal") paid the sum of RM29,500 to Mr. Ratnavale; that on 21 March 1967, Manilal paid a further sum of RM250,000 to Mr. Ratnavale; and that on 20 June 1968, Mr. Ratnavale repaid a sum of RM50,000 to Manilal. The claim now being pursued by Manilal is for payment of the difference between the total of the sums paid by Manilal to Mr. Ratnavale and the amount repaid by him.

The action was begun by a writ issued on 30 July 1974. When the writ was issued the plaintiff was J.N. Patel who was at that time Managing Director of Manilal but who has since parted company from Manilal as a result of personal disagreements. On 7 December 1974 an application was made to substitute Manilal for J.N. Patel as plaintiff in the action. At this time no question of limitation had been raised in defence and the application to allow the action to proceed with Manilal as plaintiff was granted. The statement of claim was delivered on 20 June 1975 and the action came on for trial before the Judicial Commissioner on 18 September 1981 when evidence was led from R.D. Patel, the present Managing Director of Manilal. On 9 December 1981, for the first time, the question of limitation arose on an application by Mr. Ratnavale's executors to strike out the plaintiff's pleadings. That application was refused but leave was given to amend the writ and statement of claim and also to amend the defence. Manilal's amendments appear to have been made on 16 December 1981 and those of Mr. Ratnavale's executors on 1st June 1982. The case came on for hearing again on 23 June 1982. On 24 June 1982 the evidence of Mr. R.D. Patel was resumed. After further adjournment the trial was eventually concluded on 5 August 1982 and judgment given by the Judicial Commissioner on 22 March 1983.

After holding that the sum of RM29,500 and the sum of RM250,000 were both received by Mr. Ratnavale, the learned Judicial Commissioner went on to hold that Manilal had established that the difference between the total of these sums and the amount repaid by Mr. Ratnavale of RM229,500 was paid to Mr. Ratnavale on the security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah, the equitable charge being based on the common intention of Manilal and Mr. Ratnavale to have the said two lots charged to Manilal as temporary security pending sale of certain property including these lots, referred to as the Meera Estate property and division of the sale proceeds. He went on to hold that when the sale of Meera Estate, and the realisation of the proceeds of sale, was not wholly effected, Manilal pressed for the return of the sums of money put into the joint venture, which had been established between Manilal and Mr. Ratnavale, for the purchase and sale of the Meera Estate and further that on or about 20 June 1968 when repaying the sum of RM50,000 Mr. Ratnavale agreed in return for an extension of time to repay the balance of RM229,500 with interest. This extension of time was for a period of six months to 20 December 1968. The Judicial Commissioner held that the lien and charge to which he referred were based on the deposit of title deeds with the solicitors who were acting both for Manilal and Mr. Ratnavale for the purpose of preparing a formal charge.

It follows from these findings that the right to sue for the balance of RM229,500 arose on 20 December 1968, and since the writ was issued on 30 June 1974, the statutory limitation period of six years provided by s. 6(1) of the Limitation Act 1953 (Malaysia Act 254) ("the 1953 Act") relevant to this action had not expired by the time this action was brought. The learned Judicial Commissioner therefore held Manilal entitled to repayment of the balance of RM229,500 with interest thereon at 10 per cent annum compound with yearly rests from 21 June 1968 to the date of judgment and thereafter at 8 per cent annum to the date of satisfaction. Counsel for Manilal, before their Lordships, accepted that it was not correct to allow compound interest, but he submitted that it was right to allow a reasonable rate of interest since none had been specified in the contract, and the rate allowed by the learned Judicial Commissioner was appropriate in the circumstances.

Mr. Ratnavale's executors appealed to the Federal Court. After reviewing the relevant evidence, the Federal Court, in their judgment dated 20 January 1984, concluded that the finding of the learned Judicial Commissioner regarding the sums of RM29,500 and RM250,000, to the effect that they had been paid by Manilal to Mr. Ratnavale, was correct and that there was no reason for the Federal Court to interfere with this finding. They then went on to consider how the 1953 Act applied to the matter in issue and proceeded, apparently without considering any other possibility, upon the basis that the right of action accrued in respect of these sums on the dates when they were paid by Manilal to Mr. Ratnavale. They concluded that the sums escaped limitation only if it was shown that they had been paid in connection with a joint venture for the purchase of Meera Estate and were secured by a mortgage or other charge on land.

Although the Federal Court took the view that an equitable charge on land, such as was suggested by Manilal in the present case, was possible under the relevant law of Malaysia, they concluded, differing in this respect from the Judicial Commissioner, that, while the sum of RM29,500 was paid as part of a subscription for the purchase of the Meera Estate, the sum of RM250,000 was not and that accordingly this money was a personal loan to Mr. Ratnavale which at the time the action was instituted had become statue barred. The Federal Court accordingly allowed the appeal except in so far as it related to the sum of RM29,500.

On that sum they awarded interest at the rate of 3 per cent from the date Mr. Ratnavale received the sum to the date of judgment and thereafter at the rate of 8 per cent to the date of payment stating that they thought it fair and proper that it should be so ordered.

In dealing with the matter on which they differed from the Judicial Commissioner, the Federal Court accepted that the sum of RM250,000 might well have been used by Mr. Ratnavale to pay for the four lots comprising part of the Meera Estate land of which he took a transfer within about a week after receiving this sum, but they considered that it was not clear whether the purchase was his own purchase alone or joint venture purchase with Manilal. They stated that none of the witnesses who testified in the case had personal knowledge of the matter and that Mr. J.N. Patel, the only surviving person who in their view had personal knowledge of the matter, had not given evidence. To determine whether the purchase of these lots was a joint venture purpose or not they could look solely at the available contemporaneous documentary evidence. While they accepted that the receipt issued by Mr. Ong Huck Lim, who was the solicitor both for Manilal and Mr. Ratnavale, indicated that the purchase was a joint venture purchase they attached very considerable importance to the way in which the sum was accounted for and treated in Manilal's account books and balance sheets. They pointed out that the manner of treatment in Manilal's books for 1967 and 1968 was consistent with treating this sum as a personal loan to Mr. Ratnavale and that in 1969, when this was changed to as to treat the sum as a portion of the capital of Manilal for purchase of Meera Estate land, this was done by Mr. R.D. Patel without any personal knowledge of the matter since he

> ... was not involved in whatever arrangement the deceased had with his predecessor, Mr. J.N. Patel regarding this sum. Only the latter and the common solicitor, Mr. Ong Huck Lim, and the deceased could clarify the matter. Of course, the last two cannot be raised from their graves but there seems to be no reason why Mr. J.N. Patel, who is still alive, could not be in court, especially when the suit itself was commenced by him in his personal name and even the caveats against the land were applied for by him also in his personal name.

The Federal Court considered that support for their view was also derived from the fact that the caveats on the land and this action originally were taken in the name of Mr. J.N. Patel while at least part of the pre-writ correspondence stated that the solicitors seeking to pursue the claim were acting for Mr. J.N. Patel. The Federal Court went on to point out that in their opinion this aspect of the matter had not been dealt with by the learned Judicial Commissioner.

Although it is true, as has already been pointed out, that the Federal Court did not expressly consider the Judicial Commissioner's finding that the cause of action for recovery of the RM229,500 arose on 20 December 1968, this finding by the Judicial Commissioner was dependant upon his earlier finding that the sums of RM29,500 and RM250,000 were payments by Manilal for the acquisition by Manilal of an interest in a joint venture for the purchase of Meera Estate land and that, on that joint venture not proceeding to a speedy realisation for the benefit both of Manilal and Mr. Ratnavale, the arrangements were changed to provide that Mr. Ratnavale should have the whole interest in the land for himself, subject to the arrangements for security for the financial interest of Manilal and for repayment, first, of the RM50,000 which was made on 20 June 1968, and of the balance on 20 December 1968, as Mr. R.D. Patel had testified. It follows that it would be right to restore the learned Judicial Commissioner's finding on the date at which the cause of action arose only if the decision of the Federal Court that it had not been established that the sums were paid for joint interest in the Meera Estate land could be overturned, and the decision of the learned Judicial Commissioner on this point restored.

The evidence on which the learned Judicial Commissioner based this part of his decision was primarily the evidence of Mr. R.D. Patel. The record that was before the Federal Court was not a full transcript of a verbatim shorthand record of the evidence but was only the learned Judicial Commissioner's long-land notes of the evidence. As was pointed out by Lord Fraser of Tullybelton in giving the judgment of the Board in *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 2 MLJ 41, at p. 42, the disadvantages under which an appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has a verbatim transcript. Mr. R.D. Patel gave evidence that in 1966, although a younger man, he was a Director of Manilal and he remembered the transactions with Mr. Ratnavale. He saw Mr. J.N. Patel, with whose signature he was familiar, sign the cheque for RM29,500 and he testified that the cheque for RM250,000 was collected by Mr. Ratnavale from Manilal's office and the corresponding receipt, which refers to charges of grants for two lots of land at Mukim of Kulim, was brought by Mr. Ratnavale to Manilal's office. He also testified that Mr. J.N. Patel wanted a charge on the lands concerned and that the charge was to be a temporary thing. He testified further in cross-examination that the arrangement was that Mr. Ratnavale would sell the lands and that Manilal would make quick profits. He stated that he was present at the discussions that Mr. J.N. Patel had with Mr. Ratnavale, that the profits were to be shared fifty-fifty, and Ong Huck Lim was to be the lawyer acting for both of them. All this was a matter of verbal agreement, according to Mr. R.D. Patel, with those acting for Manilal trusting Mr. Ratnavale. In re-examination Mr. R.D. Patel stated, according to the learned Judicial Commissioner's note, that when Mr. Ratnavale paid the RM50,000 he was pressed for more and he asked for a further extension of time for six months to pay the balance with interest to which those acting for Manilal agreed. He stated that in 1969 there were similar extensions when Mr. Ratnavale asked for time. Mr. R.D. Patel and his colleagues believed that Mr. Ratnavale would fulfil his promises without legal action.

Although it is true that Manilal's pleading gave only a very sketchy indication of how their case was to be developed, this evidence was given without objection and the learned Judicial Commissioner has accepted it. Their Lordships consider that the reasons given by the Federal Court for not accepting the learned Judicial Commissioner's findings are in these circumstances insufficient. In particular it appears that Mr. R.D. Patel did claim personal acquaintance with the circumstances of the transaction and that the Federal Court were wrong to state that none of the witnesses who testified really had personal knowledge of the matter, and that Mr. R.D. Patel was not involved in whatever arrangement Mr. Ratnavale had with his predecessor, Mr. J.N. Patel. Their Lordships accept that minor criticisms can be made of the evidence of Mr. R.D. Patel, as recorded in the notes of the Judicial Commissioner, and Counsel for the respondents, in his very helpful and clear submissions, pointed these out forcefully. It is also true that the learned Judicial Commissioner states:

> As the witnesses called by the defendants came into the picture only in the year 1971, the Court has therefore to come to its findings of fact regarding the alleged transactions, financial or otherwise, between the plaintiff and the deceased during the years 1966 to 1970 solely on the evidence of these three witnesses "that is the witnesses called for Manilal including Mr. R.D. Patel' and these witnesses only.

Counsel submitted that in so doing the learned Judicial Commissioner had excluded from consideration the documentary evidence and, in particular, the evidence that had been submitted of the way in which these transactions were handled in the company's books. However, it is plain that the learned Judicial Commissioner was dealing, at this point, as he states, with the persons who stepped into the witness box to give evidence. It is apparent

from many passages in his judgment that the learned Judicial Commissioner did have regard to the documentary evidence and he mentions for example, the ledger account of Manilal in connection with the payment of the sum of RM29,500. It is perfectly understandable that in the circumstances explained to him in evidence he attached little importance to the manner in which the RM250,000 was dealt with during 1967 and 1968 in the accounts of Manilal.

The fact that the caveat and this action originally were taken in the name of Mr. J.N. Patel is explicable on the basis that he was acting as agent for Manilal in these matters and it is apparent that the absence of Mr. J.N. Patel from the witness box was a matter which did receive attention from the Judicial Commissioner.

For these reasons their Lordships are of opinion that neither the reasons expressed in the judgment of Federal Court, nor the additional matters raised in argument by learned Counsel for the respondent at the hearing of this appeal, are sufficient to displace the findings of fact on this matter by the learned Judicial Commissioner. Proceeding on this basis, the plea of limitation fails since the action was raised within six years from the date on which the cause of action in respect of the RM229,500 balance arose. On the question of interest there is no evidence before their Lordships to indicate that the learned Judicial Commissioner's assessment of 10 per cent as a reasonable rate of interest was wrong and no basis upon which they could fix any other figure. It is therefore appropriate that the rate of interest awarded by the learned Judicial Commissioner should be restored, but only as simple interest since the appellants accept that it was wrong for him to have awarded compound interest. This is sufficient for disposal of this appeal.

Two further matters require mention. In their printed case on this appeal and in argument at the hearing, Counsel for the appellants sought to submit that Mr. Ratnavale, or his agents, had acknowledged the debt sued for in letters dated 30 November and 16 December 1972. The appellants had not pled at any stage previously that Mr. Ratnavale, or his agents, had acknowledged the debt within the meaning of s. 26(2) of the 1953 Act nor was this point argued before the learned Judicial Commissioner. The letters founded on as acknowledgments were before the Judicial Commissioner as part of an agreed bundle of documents but they were used at the trial only as evidence that the debt had been incurred. In *Overseas-Chinese Banking Corporation Limited v. Philip Wee Kee Puan* [1984] 1 CLJ (Rep) 25 Lord Bridge of Harwich, delivering the judgment of the Board, quoted from a judgment of the Federal Court in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10. After quoting from the learned Chief Justice, Lord Bridge said:

> He went on to consider whether, in a case where limitation is relied on, an acknowledgment should be pleaded. He concluded, rightly in their Lordships' opinion, that it should.

In *K.E.P. Mohamed Ali*, Lord Bridge went on to hold that where, although it had not been pleaded, the matter had been fully presented and developed in the proceedings before the High Court without objection, it was right for the appellate Courts to consider it, but no such factor is present in this case. Their Lordships, had they found it necessary to consider this matter, would not have been prepared to allow this question to be entertained for the first time at the present stage in this litigation. Although many of the matters, which would be important in considering whether the relevant acknowledgment had been duly made with appropriate authority from Mr. Ratnavale in the letters founded on, would also have been important in considering the value of these letters as evidence of the existence of the debt, the crucial importance of these questions on the limitation aspect made it, in their Lordships' opinion, inappropriate to allow the matter of acknowledgments to be raised in the appeal for the first time when it had never appeared on the pleadings and when it had not been considered at all either by the Judicial Commissioner or by the Federal Court.

Considerable consideration was given in the Courts below to the question whether an equitable charge, such as was founded on by Manilal in the present case, is recognised by the law of Malaysia. On this point the judgment of the Federal Court was against the respondents but since in the view they have taken of this matter the question need not be further considered, their Lordships did not hear argument from the respondents upon it. Accordingly their Lordships express no view on this question.

For the reasons which they have given, their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed with costs before the Federal Court and the Board and that the judgment of the Judicial Commissioner should be restored with the deletion therefrom of the words "on the security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah" and the words "compound interest with yearly rests."

Also found at [1986] 2 CLJ 2